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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIJAH PAUL LOPEZ,

Defendant and Appellant.

B212940

(Los Angeles County
Super. Ct. No. NA077891)

APPEAL from a judgment of the Superior Court of Los Angeles County.
James B. Pierce, Judge. Affirmed.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Elijah Paul Lopez (appellant) of first degree residential burglary in violation of Penal Code section 459.¹ The trial court found appellant had suffered three prior convictions for serious felonies (§§ 1170.12, subds. (a)–(d); 667, subds. (b)–(i); 667, subd. (a)(1)) and had served a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced appellant to a total of 40 years to life. The sentence consisted of 25 years to life for the burglary and five years for each of the three prior serious felony convictions pursuant to section 667, subdivision (a)(1). The trial court imposed and stayed a one-year sentence for the prior prison term.

Appellant appeals on the grounds that: (1) there was insufficient evidence to support his conviction for burglary, and (2) the trial court erred prejudicially in failing to instruct the jury that his fingerprint must have been left at the time the burglary was committed.

FACTS

On March 19, 2008, Vivian Linderman (Linderman) left her Long Beach home for approximately 45 minutes and returned to find someone had broken into the home through the side door. The door and door frame were damaged, and the home was in disarray. Someone had taken four laptop computers and a 42-inch television that had been hanging on a wall. The speakers for the television were lying on the floor. Linderman called the police. A crime scene technician dusted for fingerprints throughout the home. The Lindermans had owned the television for four or five years, and it had never been serviced. No one had permission to enter her home while she was out or to take the television and the computers.

Sarah Barnard (Barnard), a forensic specialist with the Long Beach Police Department, processed the Linderman residence for fingerprints. Barnard was able to lift prints from a speaker on the living room floor and a tin can in one of the bedrooms.

¹ All further references to statutes are to the Penal Code unless stated otherwise.

Heather Galloway (Galloway), also a forensic specialist, obtained appellant's fingerprints and compared them with the prints taken from the speaker and tin can at the Linderman residence. Galloway determined that the prints taken from the speaker belonged to appellant. The prints were from the right middle and right ring fingers. In accordance with her practice, two other fingerprint examiners checked her finding. The fingerprint from the tin can did not have enough detail to identify it.

DISCUSSION

I. Sufficiency of the Evidence

A. *Appellant's Argument*

Appellant contends there was not substantial evidence to support his burglary conviction because there was insufficient evidence that the speaker on which his fingerprints were found was previously inaccessible to him.

B. *Relevant Authority*

"Our Supreme Court has set forth the applicable constitutional test concerning the sufficiency of evidence in cases where the conviction is premised on fingerprint evidence as follows: 'An appellate court called upon to review the sufficiency of the evidence supporting a judgment of conviction of a criminal offense must, after a review of the whole record, determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.] The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a

reasonable doubt.” [Citation.]’ [Citations.]” (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

C. Evidence Sufficient

The California Supreme Court has repeatedly held that fingerprints are the strongest evidence of identification and are generally sufficient by themselves to identify the perpetrator of the crime. (See *People v. Andrews* (1989) 49 Cal.3d 200, 211; *People v. Johnson* (1988) 47 Cal.3d 576, 601, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 752–754; *People v. Gardner* (1969) 71 Cal.2d 843, 849; *People v. Riser* (1956) 47 Cal.2d 566, 589, overruled on another point in *People v. Morse* (1964) 60 Cal.2d 631, 652, fn. 17.) The jury is entitled to draw its own inferences as to how the defendant’s prints came to be on an item and to weigh the evidence, including the opinion testimony. (*People v. Massey* (1961) 196 Cal.App.2d 230, 234; *People v. Preciado* (1991) 233 Cal.App.3d 1244, 1247 (*Preciado*).)

In *Preciado*, for example, the defendant’s fingerprint was found on a wristwatch box in a burgled condominium. The victim had received the watch as a gift 18 months earlier, and the box had not left his condominium since that time. (*Preciado, supra*, 233 Cal.App.3d at p. 1246.) The court observed that defendant “either touched the item during an uninvited foray or—miracle of miracles—he did so some 18 months earlier, before the victim received the gift, and the fingerprints endured.” (*Id.* at p. 1247.) The fingerprint evidence, the court found, was sufficient to support defendant’s burglary conviction. (*Ibid.*)

The instant case is analogous to *Preciado*. It is reasonably inferable that the person who left two fingerprints on the speakers was the person who burgled the home and took the television. The television had been mounted on the wall in an entertainment center, and Linderman said the speakers had been on the same shelf as the television, which was held by a bracket. Linderman said the television had been in the same place since she acquired it four or five years earlier. The television had never been serviced. The photograph of the unit in which the television and speakers were installed

(People’s exh. No. 5) suggests it is reasonable to assume the speakers were dusted many times during the four or five years they were in the Linderman home. As in *Preciado*, appellant “either touched the item during an uninvited foray or—miracle of miracles—he did so” before the television was delivered and professionally installed four or five years earlier, “and the fingerprints endured.” (*Preciado, supra*, 233 Cal.App.3d at p. 1247.)

Appellant relies on *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353 (*Mikes*), where the court held that, “in fingerprint-only cases in which the prosecution’s theory is based on the premise that the defendant handled certain objects *while committing the crime in question*, the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. [Citations.]” (*Id.* at pp. 356–357.) The victim in *Mikes* had purchased a turnstile from a hardware store prior to his murder, and the components of the turnstile were found disassembled at the crime scene. (*Id.* at p. 355.) Six of the defendant’s fingerprints were found on the turnstile posts, and two of his prints were found on the post that appeared to be the murder weapon. (*Id.* at pp. 355–356.) The victim had acquired the turnstile four months before his death. (*Id.* at p. 355.) The Ninth Circuit panel found it was possible that the defendant’s fingerprints were on the posts prior to the time the victim purchased it. (*Id.* at pp. 358–359.)

Mikes is merely persuasive rather than binding authority. (See *People v. Figueroa, supra*, 2 Cal.App.4th 1584, 1587, 1588.) Moreover, the Ninth Circuit sitting en banc and in a three-judge panel has declined to apply *Mikes* in two cases where the only evidence consisted of the defendant’s fingerprints on a glass louver pane or on a windowsill. (*Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017, 1022–1023; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 909–910.) In addition, Division 5 of this court declined to follow *Mikes* in *People v. Figueroa, supra*, at page 1588. All of these cases distinguished *Mikes* on the facts. Although there is less evidence pointing to appellant’s guilt in the instant case than in those cases, we believe the circumstances of this case are distinguishable from those of *Mikes* as well.

The *Mikes* court held that “the record must be sufficient to justify a reasonable fact-finder’s conclusion that the posts were not accessible to the defendant during the relevant period,” which in *Mikes* was the period shortly before the victim acquired them. (*Mikes, supra*, 947 F.2d at p. 361.) The court stated, “The ‘relevant time’ is defined as the time prior to the commission of the crime during which the defendant reasonably could have placed his fingerprints on the object in question *and* during which such prints might have remained on that object. We must examine, in each case, the circumstances surrounding the custody or location of the object, as well as its function, the accessibility of the object to the defendant, and the extent to which the object was or could have been handled by others.” (*Id.* at pp. 357–358.) We believe that, in this case, the prosecution presented evidence (as we have set out *ante*) sufficient to permit a reasonable jury to conclude that the object on which appellant’s fingerprints appeared was inaccessible to him prior to the commission of the crime during the “relevant time,” which in this case would have been four to five years before the burglary, when the Lindermans acquired the television and speakers.

Based on the foregoing, we conclude the record contains sufficient evidence identifying appellant as the perpetrator, and the determination that the fingerprints were left on the speaker during the commission of the burglary was not “unreasonably speculative” under the circumstances of this case. (*Mikes, supra*, 947 F.2d at p. 361.) “[A]ll of the evidence is to be considered in the light most favorable to the prosecution,’ [citation,] that the prosecution need not affirmatively ‘rule out every hypothesis except that of guilt,’ [citation,] and [] a reviewing court ‘faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution,’ [citation].” (*Wright v. West* (1992) 505 U.S. 277, 296.) As the jury aptly found, there is no reasonable possibility appellant left his fingerprints on the speaker four or five years earlier and that they were not left there during the burglary of the Linderman home.

II. Requested Instruction

A. *Appellant's Argument*

Appellant contends the trial court erred by refusing to give his pinpoint instruction. The trial court thus violated his right to adequate instructions on the defense theory of the case as well as his constitutional rights to present a defense, to due process of law, and to a fair trial. Appellant argues that the accuracy of his proposed instruction has been upheld by case law, citing *People v. Johnson* (1984) 158 Cal.App.3d 850 (*Johnson*) and *Birt v. Superior Court* (1973) 34 Cal.App.3d 934 (*Birt*). He contends that a properly instructed jury would have found that the burglar was not appellant, and the error was not harmless beyond a reasonable doubt under the *Chapman* standard.² Appellant claims there is also a reasonable chance the error affected the verdict under the *Watson* standard.³

B. *Proceedings Below*

Defense counsel requested the following pinpoint instruction: “Fingerprints by themselves do not establish that the defendant committed the crime charged. A guilty verdict may not be based on fingerprint evidence alone unless the prosecution has proved beyond a reasonable doubt that the fingerprints were left at the time the crime was committed.” Defense counsel argued that the instruction merely stated the law. The prosecution contended that the instruction “smack[ed] of argument,” and the instruction on the crime of burglary was sufficient.

The trial court found that the requested instruction was couched in terms of argument as opposed to law. The court believed common sense dictated that the jury would find appellant not guilty if it believed the fingerprints were left at some other time.

² *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

³ *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

C. Relevant Authority

A trial court must sua sponte instruct the jury on general principles of law that are commonly or closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Abilez* (2007) 41 Cal.4th 472, 517; *People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.)

Upon request, the trial court must give an instruction that "pinpoints" the defense theory if the requested instruction is supported by substantial evidence and is not argumentative or duplicative. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142; *People v. Hughes* (2002) 27 Cal.4th 287, 361; *People v. Earp* (1999) 20 Cal.4th 826, 886.) In determining whether an instruction is required, the trial court does not weigh the credibility of the defense evidence, but only whether there was evidence which, if credited by the jury, was sufficient to raise a reasonable doubt. (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

D. No Error

We conclude appellant's instruction was properly refused. There was no substantial evidence in support of its language, and it was argumentative. The standard instructions sufficiently conveyed the elements of the offense to the jury. In addition, the cases appellant cites were not cases wherein "[t]he accuracy of [the requested] instruction has been upheld," as he claims.

In *Johnson*, a search of a house yielded several glass bottles containing PCP. The defendant's thumbprint was on one of the bottles, which was hidden in an overhang in the kitchen ceiling. There were also other, unidentifiable prints on the bottle. An expert testified that it was not possible to determine how long the defendant's thumbprint had been on the bottle, or whether there was PCP in the bottle when he placed his thumbprint there. The defendant was standing in the kitchen with another person at the time of the

search. There was no other evidence connecting the defendant to the house or its contents. (*Johnson, supra*, 158 Cal.App.3d at pp. 852–853.) The court concluded the evidence was insufficient to support defendant’s conviction of possession of PCP for sale. (*Id.* at p. 853.) The evidence did not establish that defendant physically possessed the PCP, only that he touched the glass bottle at some point in time, possibly when it contained its original, legal contents. (*Id.* at pp. 855–856.)

Johnson was a possession for sale case in which the defendant had to exercise dominion and control over the contraband in order to be found guilty. In that situation, a fingerprint alone would be inadequate to prove the elements of the offense, which were “physical or constructive possession with knowledge of the presence and narcotic character of the drugs [citations] for the purpose of sale.” (*Johnson, supra*, 158 Cal.App.3d at p. 853.) The elements of the burglary committed in the instant case required only proof that appellant entered the building and did so with the intent to commit theft—elements that can be proved by the mere presence of appellant’s fingerprints on the speakers under the circumstances of this case. Therefore, the *Johnson* case does not support the reading of appellant’s proposed instruction.

In *Birt*, the intended victim of a burglary returned home and surprised two men in the process of loading a Ryder rental van with his property. (*Birt, supra*, 34 Cal.App.3d at pp. 936–937.) One of the petitioner’s fingerprints was found on a cigarette lighter located on the front passenger seat. (*Id.* at p. 937.) The petitioner, a female, contended she was committed by the magistrate without probable cause. (*Id.* at p. 936.) The court found it “appalling” that the petitioner was being prosecuted on such scanty evidence. (*Id.* at p. 937.) The court pointed out that the lighter was a readily movable object, it was not shown to have been taken from the burgled home, none of the petitioner’s fingerprints were shown to have been found in the home or on the property, other fingerprints were found in the van, and the van was a rental vehicle available to the public. (*Id.* at p. 938.) Only by speculation or guesswork could it be inferred that the petitioner was inside the van or in the area at the time of the burglary. (*Ibid.*)

The *Brit* court correctly reasoned that a fingerprint on a cigarette lighter found inside a rented truck used by two male burglars was not sufficient to hold the female petitioner to answer for the burglary. In the instant case, by contrast, the inference drawn from the presence of appellant's prints was reasonable, and no guesswork was necessary. The fingerprints were found *inside* the burgled home on an object that had clearly been moved in order to disassemble the fixture holding the television, which was the burglar's desired object. The speakers were not as readily movable as a cigarette lighter, which is often passed from one person to another. As shown in People's exhibit No. 5, the speakers were an integral part of the stolen large screen television. The speakers had been mounted with the television for four or five years, and the television had never been serviced. There was no evidence that provided another possible explanation for the presence of appellant's prints—only conjecture. Under these circumstances, the reasoning of *Brit* as support for appellant's proposed instruction is inadequate.

Furthermore, the record shows that the jury was properly instructed on the elements of residential burglary, which told the jury that it could find appellant guilty only if it found he entered the residence with the intent to commit theft. (CALCRIM No. 1700.) The jury was also instructed on the meaning of proof beyond a reasonable doubt. (CALCRIM No. 220.) As the trial court stated, if the jury had a reasonable doubt that the fingerprints were left on the date of the burglary and believed the prints could have been left at an earlier time, common sense dictates that the jury would have concluded that appellant was not proved guilty. Defense counsel certainly provided them with food for thought on this issue when he pointed out to the jury that the prosecution's entire case rested on the fingerprint. He reminded the jury that appellant was never seen at the location of the crime or found in possession of the stolen items. Counsel told the jury that this was because appellant was not there and did not commit the crime.

We conclude the trial court did not prejudicially err in refusing to give appellant's requested instruction. Nor did the trial court's ruling violate appellant's right to adequate

instructions on his defense theory or his constitutional rights to present a defense, to due process of law, and to a fair trial.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST